

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

MEMORANDUM-DECISION AND ORDER

Presently before the Court is a motion filed on October 5, 1998 ("Motion"), by Richard C. Breeden ("Trustee"), the chapter 11 trustee of the substantively consolidated estates of The Bennett Funding Group ("BFG"), Bennett Receivables Corporation ("BRC"), Bennett Receivables Corporation II ("BRC-II"), Bennett Management and Development Corporation ("BMDC"), The Processing Center, Inc. ("TPC"), Resort Service Company, Inc. ("RSC"), American Marine International, Inc. ("AMI"), and Aloha Capital Corporation ("Aloha"; collectively, the "Debtors"), seeking approval pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bank.P.") of a settlement agreement ("Settlement") between the Debtors and their current investor-creditors ("Current Investors"), who are also defendants in several thousand adversary proceedings commenced by the Trustee.

In salient part, this Settlement will resolve a dispute between the Trustee and the Current Investors by allowing as a general unsecured claim all of each Current Investor's claim that is attributable to a return of principal, and in addition seventy percent of that part of each claim that has been allocated to interest and profit. In the event that this calculation results in a negative figure

for any claim, the Settlement proposes to treat that claim as zero. As an additional condition, the Settlement requires settling Current Investors to release their individual claims against Azzicurazioni Generali, S.P.A. (“Generali”), which is currently involved in class action litigation with both the Trustee and certain of the Current Investors in this Court and in the United States District Court for the Southern District of New York. The Motion was heard before the Court on October 22, 1998, at which time numerous interested parties appeared both in support and in opposition.

The Court notes that while the Trustee’s Motion describes the terms of the proposed Settlement in extensive detail, neither the text of the settlement itself nor any communications which will be sent to the Current Investors have yet been provided to the Court. In addition, it appears from statements made by Trustee’s counsel at the hearing on the Motion that a document of understanding now exists between the Trustee, Generali and the class action representatives, the contents of which has also not been disclosed to the Court. Though this will not prevent the Court from considering the Settlement Motion based on the description of the Settlement and the Generali agreement given within the Motion and at the hearing, no final approval will be possible until and unless the Court is able to review the actual text and contents of these documents.

As a general matter, a proposed compromise will be approved pursuant to Fed.R.Bank.P. 9019 if the benefit to the estate exceeds its cost, taking into account such factors as the probability of success for the estate, the expenses of litigation, the difficulty of collecting a judgment, and the likely duration of such litigation. *See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 420, 88 S.Ct. 1157, 1161 (1968); *See also Ehre v. New York (In re Adirondack Railway Corporation)*, 95 B.R. 9, 10 (Bankr. N.D.N.Y. 1988) (holding that settlements will be approved where expected litigation costs exceed the expected return to the

estate). Among the evidence that the Court may consider in applying the *TMT* factors is the professional opinion of the chapter 11 Trustee, *see Rivercity v. Herpel (In the Matter of Jackson Brewing Company)*, 624 F.2d 599, 604 (5th Cir. 1980), the degree of support for the settlement within the creditor body, *see Connecticut General Life Insurance Co. vs. United Companies Financial Corp. (In the Matter of Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995), and the extent to which the compromise is the result of arms-length bargaining, *see Nellis v. Shugrue*, 165 B.R. 115, 122 (S.D.N.Y. 1994).

Counsel for the Trustee, the Unsecured Creditors' Committee, and the Early Investors' Committee have each asserted that the alternative to settlement would be the continuation of several thousand adversary proceedings the ultimate results of which are not certain, which would likely burden the Debtors with significant added legal costs that will far outweigh the actual benefit to the estate. Likewise, the insertion of the Generali clause in the present Settlement appears to be a key condition of a pending compromise between the Trustee, the class action representatives and Generali which is expected to result in a gross recovery of approximately \$125 million. The Court finds significance in the fact that although numerous objections to the Motion were made, no objector appears to have questioned the Trustee's assertion that the settlement of these many adversary proceedings will provide a cost-effective outcome for the estate. As a result, the Court concludes that the proposed Settlement meets the threshold requirements of *TMT*.

Nearly all of the objectors to this Motion have questioned whether the Settlement is fair and equitable, expressing concern that the Trustee may not offer similar terms to similarly-situated creditor groups not covered by the Settlement, or that the Generali clause will adversely affect the rights of individual creditors who have until now pursued their own claims against Generali and

have not joined the class action litigation. Even assuming that these arguments have merit, the Court cannot conclude that they are ripe. As this Court has not yet been presented with the Generali settlement, or with the proposed settlements involving creditors not covered by the current Settlement, it cannot entertain an objection based on an allegation of hypothetical future discrimination. *See Drexel Burnham Lambert Group, Inc. v. Claimants Identified on Schedule 1 (In re Drexel Burnham Lambert Group, Inc.)*, 995 F.2d 1138, 1146 (2nd Cir. 1993) (refusing to invalidate a debtor's settlement based on an alleged conflict with a distribution plan not yet formally presented to the court).

Likewise, there is no per se rule against a debtor entering into a settlement outside the context of a formal chapter 11 plan, even on an issue as significant as the Current Investor claims in this case. *See SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert)*, 960 F.2d 285, 293 (2nd Cir. 1992). There can be no dispute that approval and implementation of the Current Investor Settlement will vastly simplify a highly complicated chapter 11 case, and that the granting of this Motion will move the Trustee a significant step closer to the filing of a formal plan. Accordingly, the Court finds that the timing of this settlement offer is reasonable.

Based on the foregoing, the Motion of the Trustee is hereby GRANTED, and it is further ORDERED, that the Trustee on behalf of the Consolidated Estate is hereby authorized to enter into settlements with the Current Investors pursuant to the terms set forth within the Motion, and to consummate such settlements, without further order of the Court, and it is further

ORDERED, that prior to the consummation of any such settlements, and in any case within thirty (30) days following the date of this Order, the Trustee shall file with this Court copies of any and all documents whereby a typical member of the Current Investors will actually settle their

claims against the Consolidated Estate, and it is further

ORDERED, that prior to the consummation of any such settlements, and in any case within thirty (30) days following the date of this Order, the Trustee shall file with this Court for its in camera review copies of any memoranda of understanding or other agreements pertaining to the actual settlement between the Debtors or the Trustee, the class action representative and Generali, and it is finally

ORDERED, that the Trustee is authorized to pay an interim distribution to each settling Current Investor who did not receive a full interim distribution in an amount determined by the Trustee to be the amount such Investor would have received in the August 1998 interim distribution if such Investor had received the full distribution, less any amount actually paid to such Investor if such Investor received a partial distribution, subject to the resolution of any outstanding objections to the Investor's claim that are unrelated to the Settlement described in the Motion.

Dated at Utica, New York

this 28th day of October 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge